No. 109

JAMES R. BROWNING.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

ARCO AUTO CARRIERS, INC., ET AL. *Appellants*

v.

STATE OF ARKANSAS, EX REL.
BRUCE BENNETT, ATTORNEY GENERAL *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

REPLY TO JURISDICTIONAL STATEMENT

Of Counsel:

J. FRANK HOLT
Attorney General
State of Arkansas

BRUCE T. BULLION
600 Union Life Building
Little Rock, Arkansas
Special Assistant
Attorney General
State of Arkansas

Attorney for Appellee

PARAGON PRINTING CO., LITTLE ROCK

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OPINION BELOW

The opinion of the Supreme Court of Arkansas sought to be reviewed by the petition for appeal is not yet officially reported, but is found in the appendix ("A" pp. 1a-5a) to the Jurisdictional Statement of Appellants.

JURISDICTION

Appellants seek to review the action of the Supreme Court of Arkansas in affirming a decree of the Chancery Court of Pulaski County, on March 25, 1960, whereby the right and authority of the State of Arkansas to levy and collect *ad valorem* taxes, proportionably, upon the properties of appellants found in Arkansas, was upheld and sustained. Re-hearing was denied by the Supreme Court of Arkansas on January 9, 1961.

QUESTION PRESENTED

Whether the State of Arkansas may lawfully assess, levy and collect, proportionably, *ad valorem* taxes upon the properties of non-resident motor carriers, operating pursuant to certificates of convenience and necessity from the Interstate Commerce Commission, into and through the State of Arkansas; said proportionate basis being the ratio of total Arkansas miles to system miles for the taxable period. The Arkansas Courts have held that this tax as so assessed and levied, does not violate Article 1, Section 8, Clause 3, and Section 1 of Amendment 14 to the United States Constitution. Appellant urges that this Arkansas tax does violate these constitutional provisions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Arkansas Statutes which appellants urge violate the Constitution of the United States are Sections 84-601 to 615, inclusive, of the Arkansas Statutes of 1947, and are set forth in Appendix "C" (pp. 9a-12a), to appellants' Jurisdictional Statement.

2. Appellants argue that the enforcement of the above statutory provisions by the State of Arkansas, and against them, individually, even on a proportionate basis of Arkansas miles to system miles violates: (a) Article 1, Section 8, Clause 3; and (b) Sec. 1, of Amendment 14 to the United States Constitution; which the appellee vigorously denies.

STATEMENT OF THE CASE

The State of Arkansas for many years has derived a substantial portion of her tax revenues necessary for governmental operation, from the *ad valorem* tax on per-

sonal and real property situated within her borders. The problem of assessing and collecting such taxes from businesses operating partly within and partly without this State is now a new one to the officials charged by law with that responsibility but a review of the facets to this problem, at this time, would be of little benefit. Needless to say, however, as early as 1911 this State became conscious of the problem, as the same is and was then, applicable to railroad operations, both passenger and freight rail service. Consistent with the pronouncement of the applicable law by this Court in the *Pullman Palace Car* cases (e.g., *Pullman's Car Co. v. Pa.*, 141 U.S. 18, 35 L. ed. 613), wherein this Court affirmed the so-called mileage formula of *ad valorem* taxation on interstate operations, the State of Arkansas has consistently pursued and applied that formula against the properties of interstate railroads (all phases); utilities (gas, light, water and telephone companies); bus companies; and motor freight companies.

The system of assessment, applied by Arkansas in such cases, is that each of these companies operating partly within and partly without this State, are required to list all of their properties, annually, on forms prescribed by the Arkansas Assessment and Coordination Division (and its predecessor agencies by various names). In addition to the property listings and their asserted value by the taxpayer, the taxpayer was also required to report: (1) the total system miles travelled throughout the taxable year; and (2) the total Arkansas miles thereof.

Upon receipt of these forms, the Arkansas agency would make certain deductions and adjustments in the properties so reported, in accordance with law, and to the balance left would multiply it by the percentage which the Arkansas miles bears to system miles and the figure thus

determined would constitute the value of the properties for purposes of the assessment of Arkansas *ad valorem* taxes. In case a taxpayer in the category here considered failed to submit a list of its properties, and their value, the Arkansas agency would make an assessment thereof on the basis of the best information available. In any event, the taxpayer would be thereupon notified of the taxable value of its property, and advised that it had a specified time in which to protest the said assessment. Thereafter, the taxes against each carrier were certified for collection, and the administrative portion of this taxing responsibility for this governmental agency came to an end.

The procedure, above detailed, was followed by the State of Arkansas, for the years here involved as against all carriers by motor vehicle, including appellants. Appellants were notified of the tax as assessed against each of them, and instead of pursuing any administrative remedy, as provided by Arkansas law to protest such matters, appellants simply ignored the tax and failed and neglected to pay it. In due time, these delinquent taxes were certified to the Attorney General for collection, and this suit was filed in the Pulaski Chancery Court to collect such taxes. Appellants answered or intervened in this suit and challenged the constitutionality of the Arkansas *ad valorem* tax alleging (1) it violated the Commerce Clause of the Constitution of the United States; and (2) it violated the "due process" clause of the same Constitution. In addition, appellants challenged the tax on certain other grounds, i.e., that certain properties had been either erroneously or unlawfully included in the values determined as the base for the tax.

The Pulaski County Chancery Court sustained the power of the State to levy and collect these taxes against appellants, and in doing so held that the tax, as propor-

tionately assessed against appellants on the "mileage formula" basis, did no violence to the Constitution of the United States; and insofar as the other challenges against this tax, held that appellants had failed to pursue the administrative remedy provisions of the Arkansas law, and, therefore, were in no position to assert such arguments in this action.

Appellants appealed this adverse decision to the Supreme Court of Arkansas and that Court unanimously sustained the decision of the lower court. In their argument of insistence that the Arkansas *ad valorem* tax, as applied to their operation, was constitutional, the appellants base their argument upon the theory that because their operation does not consist in regular schedules or routes, that for some reason yet unknown (other than their plea that "it should make a difference") to appellee, this distinguishes the case from the previous pronouncements of this Court.

THE QUESTION IS NOT SUBSTANTIAL

The mere assertion that a question is substantial does not necessarily make it so. A determination of such an assertion must first consider the question in the light of the adjudicated cases, and from that analysis will come the basic understanding as to whether this case presents facts falling clearly within the prior pronouncements.

The State of Arkansas here seeks to assess, levy and collect *ad valorem* taxes from non-resident motor carriers (engaged in transporting (1) new automobiles and (2) household goods) who operate in interstate commerce and in the process, operate within her borders. No contention is made by the State that appellants are not, at all times, engaged in interstate commerce, without

doing violence to any constitutional provision, the only requirement being that this property be found within the taxing jurisdiction for the taxable period.

Many years ago this problem was brought to the attention of this Court, and the leading case most frequently cited by legal authorities is *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 35 L. ed. 613. Decided by this Court in 1890, it was said: "It is equally well settled that there is nothing in the Constitution . . . which prevents a state from taxing personal property employed in interstate or foreign commerce . . ." See also, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 195, 50 L. ed. 150; and a collection of cases in 49 ALR at p. 1099.

As in the *Pullman Palace Car* case, *supra*, the State of Arkansas has used a formula which, for lack of a better definition, we shall call a basis of "proportionate situs". She has recognized that the property of appellants is not permanently located in this State, and that appellants constantly cross the state boundary in going out and coming back. Consequently, in accordance with the statute, Arkansas has determined that the taxable portion of appellants' properties is the percentage thereof (less certain deductible properties) that the miles travelled in Arkansas, throughout the taxable year, bears to the total system miles of each such taxpayer. Thus, if one of these appellants travel one million Arkansas miles throughout the taxable year while negotiating one hundred million total system miles, that taxpayer is assessed on the basis of 1% of its personal property (less deductions previously allowed). If, however, another such taxpayer has travelled seventy-five million Arkansas miles out of a total of one hundred million system miles, it is assessed, by Arkansas, on the basis of 75%, etc.

This Court has consistently adhered to the principle laid down in *Pullman Palace Car Co., supra*, with the possible exception of *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 88 L. ed. 1283. And, whether this last cited case was a departure from the rule of *Pullman Palace* is unimportant because in the later case of *Braniff Airways* v. *Nebraska*, 347 U.S. 590, 98 L. ed. 967, the Court promptly brought the problem of *ad valorem* taxation of airlines by the states into harmony with the rule laid down in *Pullman Palace*. As to the validity of such taxes as applied to interstate movement of boats and barges see *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 93 L. ed. 585, and *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 96 L. ed. 427. See also an Annotation in 26 ALR (2) 1376.

In spite of this long standing precedent, appellants' attempt to assert "substantial question", or, to put it another way, different facts, on the theory that because they do not operate on schedules or over regular routes, this in some mysterious way justifies an assertion that their properties cannot be "found" in Arkansas for purposes of taxation. Irregular routes and a non-scheduled basis, so appellants argue, brings into play some fanciful hocus-pocus of "now you see it—now you do not see it". The State of Arkansas urges that this question has been many times decided by this Court adverse to appellants' argument. For instance, we can find nothing in *Pullman Palace*, *Ott* or *Standard Oil Co., supra*, that requires the question of situs to depend upon schedules or regular routes, and, the reality of the problem certainly dictates to the contrary. The truck, railroad car, barge, boat, etc., is just as present in the one case as the other; it is "found" within the state, proportionately, with the same accuracy (using the mileage formula) as is the scheduled, regular route carrier. One is none the less a reality than is the other, and to urge such a fanciful differentiation is to strain at a gnat. The law in this field is firmly es-

tablished and has been for many years. So, unless this Court determines it is now time to review the question with the view in mind of a departure from these long entrenched rules, the question which appellants seek to argue is not of a substantial nature.

The appellants would urge upon this Court that because the States of Kentucky, Pennsylvania and Kansas have reached different results than did the State of Arkansas, regarding the state's power to collect a tax, that this fact alone, perhaps, is sufficient to transform the question from nondescript to substantial. In the first place, appellee does not concede that these cases are similar or analogous. They are not analyzed, however, for the reasons that Arkansas does not believe this Court is too much concerned with whether those states, or all others for that matter, elect to abdicate a right to collect any tax. This is a matter of State policy which this Court has historically and consistently refused to review, so this argument of appellants, no matter how appealing, cannot transform the ordinary and usual into the unique and substantial.

The recent case of *Railway Express Agency, Inc.* v. *Virginia*, 358 U.S. 434, 3 L. ed. (2) 450, and *Northwestern States Portland Cement Co.*, v. *Minnesota*, 358 U.S. 450, 3 L. ed. (2) 421, are typical examples of the expressions of this Court that interstate commerce must bear its fair share of properly apportioned state taxation. When those cases are considered in conjunction with the many expressions of this Court beginning with *Pullman Palace*, *supra*, and weighed in the light of the argument appellants advance that irregular routes and non-scheduled basis of a carrier is sufficient to enable that carrier to escape the incidence of a fairly apportioned state *ad valorem* tax, it cannot be concluded that there is any substantial nature whatever to this argument.

CONCLUSION

The appellants herein have presented no substantial federal question, constitutional or otherwise, nor have they presented any question of sufficient importance and significance to justify the Court in going further with this case. There is no conflict in expressions of this Court, and no novel question presented by appellants. What is presented is merely an attempt to have this Court review its historic and constant holdings that interstate commerce must bear its fair share of state taxes, and, upon such review to then reverse these principles which have become so much a part of our law of this land. There is no argument advanced that the formula used was not applied equally to all, or that the formula used does not constitute a proper method of reaching the portion of appellants' property which can be considered for *ad valorem* taxation by the State of Arkansas. It may be that appellants may seek to argue that certain items of property should not have been included, and, perhaps, that certain deductions were not allowed, in some instances, that should have been allowed. These matters, however, are not properly addressed to the Court in the proceeding now before the Court. They may only be considered by pursuing the administrative remedies provided in the Act, and not in an independent suit of this nature.

It is respectfully submitted that this appeal should be dismissed.

Of Counsel:

J. FRANK HOLT
Attorney General
State of Arkansas

BRUCE T. BULLION
600 Union Life Building
Little Rock, Arkansas
Special Assistant
Attorney General
State of Arkansas
Attorney for Appellee

PROOF OF SERVICE

I, Bruce T. Bullion, Special Assistant Attorney General for the State of Arkansas, her attorney herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of March, 1961, I served a copy of the foregoing Reply to Jurisdictional Statement by personally delivering three copies hereof to Louis Tarlowski, Esq., Rector Building, Little Rock, Arkansas, counsel of record for appellants.

BRUCE T. BULLION
Attorney for Appellee
600 Union Life Building
Little Rock, Arkansas